JD(SF)–20-05
Los Alamitos, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

QUANTUM ELECTRIC, INC.

and

Cases 21-CA-31670
21-CA-31729

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 441, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND INTERNATIONAL BROTHERHOOD OF ELECTRICIAL WORKERS, LOCAL 11, INTERNATIONAL BROTHERHOOD OF ELECTRICIAL WORKERS, AFL-CIO

Lisa McNeill, Atty., NLRB Region 21,
Los Angeles, CA, for General Counsel.

Michael Swanson, President, and
Jessica Losch, Secretary/Treasurer,
Quantum Electric, Los Alamitos, CA,
for Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this compliance specification (specification) case on February 16, 2005, at Los Angeles, California. Under the terms of its order reported at 341 NLRB No. 146 (June 3, 2004), the Board required Quantum Electric, Inc. (Respondent or Company) to make Damir Tomas whole for the loss of pay and benefits he suffered as a result of his unlawful termination. Thereafter, a dispute arose over the amount of the backpay due Tomas. For that reason, the Regional Director issued a specification on September 28, 2004, as provided in Section 102.54 of the Board's Rules and Regulations. Respondent filed a timely answer that contains it's contentions as to the backpay due.

At the hearing, the parties called witnesses in support of their positions, cross-examined witnesses called by the other party, introduced relevant documentary evidence, and made statements concerning their position on various issues. At the conclusion of the hearing, the parties waived their right to argue orally and requested an opportunity to file post-hearing briefs which I granted.

After carefully reviewing the entire record[1] taking into account the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

A. The Pleadings and Contentions

The specification avers that that an "appropriate and reasonable method for determining Respondent's gross backpay liability would be to multiply the wage rate Tomas would have been paid on an hourly basis ($13.00) times the number of hours he would have worked on a weekly basis (40 hours) times the number of weeks during each calendar quarter or portions thereof during the backpay period." GC Exhibit 1(d): 2, ¶3. Based on this formula, Tomas would have earned $520 per week. Respondent's answer admits these particular allegations as well as the allegation that Tomas's backpay period began on October 24, 1996. GC Exhibit 1(i): 2, ¶1, ¶3, and ¶4.

Based on the admitted formula, the specification further avers that $5200 gross backpay accrued (10 weeks X $520 per week) during the 4th quarter of 1996 and $6760 gross backpay accrued (13 weeks X $520 per week) during the first three calendar quarters in 1997. The specification concludes the backpay period at the end of the 1997 3rd quarter on the ground that Tomas suffered a non-work related injury which rendered him unable to perform the duties of an electrician. GC Exhibit 1(d): 2, ¶5. At the hearing, counsel for the General Counsel amended the specification to shorten the backpay period by three weeks. As a result, the amended specification credits Tomas with $5200 gross backpay (10 weeks X $520) for the 3rd quarter 1997.[2] R41: 1 – R43: 8; R 80; GC Exhibit 8. General Counsel's brief also concedes that by ending the backpay period after one week in September 1997, Tomas would not have qualified for Respondent's vacation benefit as originally alleged in the specification.[3] GC Brief: 10. In addition to pay, the specification alleges that Tomas would be entitled to a cash medical benefit payment of $900. GC Exhibit 1(d): 3, ¶9.

The specification admits that Tomas had offsetting interim earnings in each quarter of the backpay period. Based on the various calculations within the four corners of the specification, as amended at the hearing and in the General Counsel's Brief, Respondent's liability would amount to $4,688.46 net backpay, a $900 medical benefit payment, and interest on those sums to the date of payment.

Respondent's answer affirmatively alleges that the backpay period for Tomas should be limited to the end of October 1996 (roughly one week) or, at the latest, "approximately December 20, 1996." For that reason, Respondent avers that Tomas's gross back pay would be no more than $4160 (8 weeks times $520 = $4160). GC Exhibit 1(i): 2, ¶5. As detailed more

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[1] The record is corrected to reflect the following changes: (1) R16: 20, "4, 5, 6, and 8" to "4, 6, 7, and 8." (2) R86: 16, "slip out" to "slip op." (3) R88: 4, "out" to "our." (4) R93: 25, "hi" to "him". In addition, the text at R44: 23 – R45: 3 is a continuation of the answer given by witness Schlumberger that commenced at R44: 22.

[2] The regional compliance officer agreed to shorten the backpay period based on Respondent's assertion that Tomas's reported interim earnings reflected that he worked only 13.5 hours in September 1997. R41: 8-14.

[3] The specification alleged that Tomas would be entitled to a vacation benefit of $79.50. GC Exhibit 1(d): 3, ¶9.

fully below, Respondent contends, in effect, that it would have laid Tomas off at least at the end of the project from which it unlawfully terminated him on October 24, 1996, if not sooner, i.e., at the conclusion of the project where it first employed Tomas. Respondent's also answer denies that Tomas would be entitled to the health benefit alleged in the specification because he would not have worked a long enough to qualify for it. The answer neither admits nor denies the amount of interim earnings disclosed in the specification. GC Exhibit 1(i): 3, ¶7.

The essential difference the parties have in this case relates to whether Respondent would have transferred Tomas to other projects between the date of his discharge and the time of his September 1997 injury that ended his backpay period. General Counsel argues that Respondent had the burden of showing that Tomas would not have been transferred or reassigned to other projects, as the specification assumes, and that Respondent failed to meet that burden.

Although Respondent readily admits reassigning some employees from one project to another, it contends that Tomas's transfer would have been highly improbable because his journeyman pay scale would have worked against his reassignment under the "dollar cost averaging" criteria it uses when making layoff decisions at the end of a project.[4] In addition, Respondent contends that it hired Tomas primarily to assist in completing its project at the California Medical Center in Los Angeles but that he wound up on its Marina Pacific AMC Theatre project in Long Beach fortuitously due to an on-the-job injury on October 7, 1996.Thus, Respondent's answer avers that Thomas' "employment would have ended on the Cal-Med project in October 1996" or, in the alternative, on approximately December 20, 1996, when it turned the AMC project (where Tomas worked when terminated) over to the owner. But even assuming that the backpay period continued into the 1st quarter of 1997 when it completed the "punch list" work on the AMC project, Respondent contends that the specification should only credit Tomas with eight weeks in the 4th quarter of 1996 because he received pay on all five of its October pay days.

B. Applicable Precedent

In *Cobb Mechanical Contractors*, 333 NLRB 1168 (2001) (*Cobb I*), the Board provided this summary of compliances case principles:

> In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed "but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB* 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Consequently, a backpay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304,305 (2d Cir. 1977).
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> The Board's well-settled policy is that "[a backpay] formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *La Favorita, Inc.*, 313 NLRB 902 (1994). Further, it is also well-settled that any uncertainty in the evidence is to be

[4] This formulation, designed to keep labor costs as low as possible, favors employees with the lowest pay rates who have the necessary skills required on the next project. According to Respondent, this analysis frequently results in the transfer of the lower-paid apprentice employees who can be matched up with a leadman or journeyman already at a new job.

resolved against the Respondent as the wrongdoer. See *Ryder/P*I*E* Nationwide*, 297 NLRB 454, 457 (1989), enfd. in relevant part 923 F.2d 506 (7th Cir. 1991).

* * *

It is axiomatic, however, that the finding of an unfair labor practice is presumptive proof that some backpay is owed. See *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S.972 (1966)

For remedial purposes, the Board does not presume that construction industry employers, such as Respondent, would have severed all employment ties with a discriminatee at the conclusion of the project where it employed the unlawfully discharged worker. *Dean General Contractors*, 285 NLRB 573 (1987). The Court of Appeals for the District of Columbia perceived that the Board, in *Dean,* created a "rebuttable presumption that an unlawfully discharged employee in the construction industry would have been transferred to a new project upon the termination of the project for which he had been employed initially." *Cobb Mechanical Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1379 (DC Cir. 2002), citing *Tualatin Electric, Inc. v. NLRB*, 253 F3d 714, 718 (D.C. Cir. 2001). For that reason, the D.C. Circuit remanded *Cobb I* to the Board to reconsider whether that employer rebutted the *Dean* presumption as to several applicant-discriminatees by showing that only two of fourteen newly hired employees had been transferred to another job site.[5]

On remand, the Board held that the employer had not rebutted the *Dean* presumption by showing that only two had been transferred elsewhere. *Cobb Mechanical Contractors, Inc.*, 341 NLRB No. 136 (2004)(*Cobb II*), slip op. 5-7. The *Cobb II* Board declined to infer, as the employer argued, that the applicant-discriminatees would have quit or been discharged in the same ratio as those actually hired (the employer fired seven; five quit) because it "does not draw 'negative inferences' against discriminatees in these kinds of situations." *Id*. at slip op. 6. Citing *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (1995), *Cobb II* states that "if presented with a choice between a inference that a discriminatee would have been discharged for cause or an inference that the discriminatee would have successfully performed his job, the Board chooses the latter inference." *Id.*

C. Relevant Facts

The 1996 calendar year commenced on Monday, January 1. The 40th week of the 1996 calendar year, the start of the 4th calendar quarter, began on Sunday, September 29. Respondent pays its employees on Wednesday for hours worked during the previous calendar week. R83: 16-18; R83: 24 – R84: 3. As Jessica Losch, the Company's secretary-treasurer, testified without contradiction that Tomas's October 30 check included pay for the period from "the 21st through the 24th," I find that the his backpay period should properly commence on October 25, 1996, rather than October 24.

When Respondent seeks to hire employees, it reviews pending resumes and selects potential applicants. Following an interview, Respondent requires a potential worker to complete written tests designed to measure the applicant's mathematical aptitude and trade knowledge. If the applicant demonstrates through this process those skills and abilities that the Company needs at that particular time, the manager involved will determine an appropriate classification and pay rate, and make an employment offer.

[5] The court also remanded another issue not relevant to this case.

Ordinarily, Respondent pays helpers or beginning apprentices from $6.50 to $7.50 an hour, second year apprentices around $8 to 9.50 per hour, third year apprentices in a range from $9 to $10 an hour; and fourth year apprentices earn about $11 an hour. Journeymen electricians earn from $12 to $14 an hour while leadmen earn from $14 an hour and above, and foremen begin at about $17 an hour and go as high as $27 an hour. The Company pays employees a $100 per month medical benefit that starts after three months of employment. Employees receive one paid vacation day after one year of employment. An added paid vacation day accrues for each year of service thereafter.

In the period from September 1996 through September 1997 and beyond, the time period relevant here, Respondent employed workers on the following projects in the Los Angeles area: (1) California Medical Center (Cal-Med) in Los Angeles; (2) Marina Pacific AMC Theatre (AMC) in Long Beach; (3) Villa Gardens in Pasadena; (4) Foto-Kem in Burbank; and (5) San Clemente Hospital in San Clemente. Jt. Exhibit 1: 2 (¶ 7). The Company completed the Cal-Med project at the end of October 1996. It concluded the AMC project around December 20 but had workers at the site engaged in change-order and punch-list work through the third week of January 1997. The Villa Gardens project lasted until sometime in 1999 and the Foto-Kem project lasted until sometime in 2000. Respondent's completion of the San Clemente job is not known but records show that the latest anyone worked there was June 17, 1997.[6]

Losch interviewed Tomas on September 13. During the interview, she spoke with Tomas about working at the Foto-Kem project in Burbank because of its proximity to his home in Glendale. Later, Losch settled on Tomas's classification and pay rate (journeyman at $13 per hour) on the basis of his test results, interview, and prior experience. After the Company called Tomas for work on September 19, he began at the Cal-Med project on September 20.

Losch claimed at this hearing that she hired Tomas to help finish up the Cal-Med job then in progress and that, but for his October 7 on-the-job injury, he would have been laid off when the Cal-Med project concluded toward the end of October.[7] However, Losch maintains that the Company transferred Tomas to the AMC job following his injury primarily to accommodate his restricted duty status. Beyond doubt, the Company transferred Tomas to the AMC job. The when and why of that transfer is another matter.

Judge Lana Parke specifically found in the underlying proceeding that "[u]pon conclusion of the Cal Med site job, Respondent transferred Tomas to the Long Beach [AMC] site supervised by Carey." 341 NLRB No. 146 (2004), slip op. p. 8. Losch now claims that his transfer resulted directly from his October 7 injury. Losch grounds her current explanation for Tomas's transfer from Cal-Med to AMC on her own recollection and the Work Status Report given to Tomas when he received treatment on October 7. The Work Status Report (Resp. Exhibit 6) shows that Tomas obtained treatment for an injured left hand at the California Medical Center, the same facility where he worked. Tomas recalled that the injury involved a deep cut

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[6] See Jt. Exhibit 1, Appendix E, showing four employees worked at San Clemente. This record shows one employee laid off on April 20, 1997, another quit on May 2, and the last two fired on June 17. The attachment to GC Exhibit 3 appears to show that the only employee laid off at San Clemente (Abraham Forshey) returned to the Company in the 1st quarter of 1998.

[7] In Respondent's post-hearing brief, Losch asserts that Tomas's "actual placement upon hiring 10 days later (presumably after the interview) affirms [the Company's] intent to use Damir Thomas for the completion of the Cal-Med project not the Burbank project or any other project." Respondent's Brief: 3. For reasons stated below, I reject this claim.

to his thumb which required no stitches. The treating physician released him for limited duty after bandaging the injury and prescribing a common analgesic for pain. The specified limitation provides that the patient should avoid soiling or wetting the dressing or the wound for a week.

According to Losch, the Company generally attempts to accommodate employee medical limitations. However, she claims that the Company transferred Tomas at the time of his injury from Cal-Med to AMC because Curt Cramer, the Company's Cal-Med foreman, advised her that that it would not be possible to accommodate Tomas's limitation at the Cal-Med site but Mark Carey, the AMC foreman, agreed that he could. Losch provided no explanation why a minor accommodation of this sort could be made on one job but not another, and neither Cramer nor Carey, who have long since left the Company's employ, testified in this proceeding.[8] Also missing is any other Company record that might support Losch's current assertion that Tomas's transfer resulted from his injury as opposed to the end of the project as found by Judge Parke. Likewise, the Company provides no explanation for the absence of such a record.

At the start of the 4th quarter of 1996, the Company employed 41 workers. Of that number, 18 eventually quit, 15 were laid off, 6 were discharged, and 2 continued their employment through the 2nd quarter of 2004. Seven of those laid off earned $10 an hour or less and six of those seven were laid off in the period between November 18, 1996, and January 13, 1997. The seventh I have included in the $10-or-less category actually earned pay in a range from $7 to $13 an hour during the period from October 1, 1996, to June 4, 1998.[9] At least 12, including Tomas, worked on more than one project. Of those who worked on multiple sites, five were eventually laid off. Those layoffs occurred as follows: John Flores, an apprentice, on November 20, 1996; Noel Gaona, an apprentice who became a journeyman before his layoff, on April 19, 2000; Thomas Hooper, a journeyman, June 28, 1998; Dan Hoopingartner, an apprentice who eventually became a foreman, on December 29, 1998; and Donald Low, a journeyman, on January 13, 1997.

Seven employees worked on the Cal-Med job. By the time the Company concluded the project, three had quit and four (including Tomas) were transferred to other projects. Three of the four transferred employees earned $13 an hour or more. Twelve employees worked at the AMC project. Aside from Tomas, five were transferred to other jobs and six were laid off. Of those laid off, Losch explained that he Company more or less fired Correll (an AMC helper) because he could not follow directions. The Company chose to lay off Meller (a journeyman) and Stewart (a first year apprentice) essentially because of their poor attendance. The Company laid Low (a journeyman) off because he was an under-performer at his pay level. Losch explained that the Company laid Gonzales off because it had no place to move him at his $17 an hour pay rate. R64: 23 – R66: 3; Respondent's Exhibit 2.

D. Further Findings and Conclusions

I find in agreement with the General Counsel that Respondent failed to carry its burden of proving that Tomas would not have been reassigned to other projects following the conclusion of those projects where he worked, i.e., Cal-Med and AMC. At the outset, Judge

[8] Losch claimed that Cramer had no recollection at all of Tomas during the original unfair labor practice hearing before Judge Parke in 2003.

[9] This individual, Josh Bean, stands as the sole exception to the conclusion I have reached that in the period from mid-November 1996 to mid-January 1997, Respondent appeared to have been laying off lower paid workers who did not quit while it retained higher paid workers for substantially longer periods.

Parke specifically found earlier that he had transferred to the AMC site upon the completion of the Cal-Med project. Losch now seeks to dispute that very significant finding with little beyond her self-serving testimony and claims of Tomas's exceptionalism. For reasons detailed below I do not credit Losch's claims about Tomas's initial employment or his transfer.

The Company's general policy of transferring productive employees to other projects if adequate work is available, contradicts Losch's claim the Company hired Tomas solely to help finish the Cal-Med project. Substantial evidence supports the existence of such a policy and Losch made no attempt to explain why the Company chose to treat Tomas's employment as an exception to its general policy. Instead, after discussing Tomas possible assignment to the long-term Foto-Kem job during his interview and subsequently transferring him to the AMC job, Respondent invites me to find that it really only hired him to assist in finishing the Cal-Med job and, therefore, the backpay period should end with that project. Based on the evidence here, it would be difficult to imagine an inference more favorable to the wrongdoer. Accordingly, I reject Respondent's claim that it hired Tomas to work solely on the Cal-Med project.

In addition, Losch's belated claim that Tomas's transfer to the AMC job amounted to a fortuitous occurrence resulting from his injured thumb rather than, as Judge Parke found, the end of the Cal-Med job lacks any significant corroboration. Neither foreman - one who supposedly could accommodate Tomas's minor work restriction and the other who could not - testified in this proceeding. Although Losch assertion that Cramer had no recollection of Tomas at all during the underlying proceeding might explain his absence, AMC foreman Carey's absence is not explained at all. Respondent likewise failed to offer any documentary evidence showing the date of Tomas's transfer, or explain its absence, that might lend credence to Losch's current assertion that the injury motivated his transfer to AMC.[10] But even assuming that the injury motivated Tomas's immediate transfer, he obviously remained at the AMC site well beyond the minor, one-week work restriction. For these reasons, I do not credit Losch's claim that the Company transferred Tomas to AMC due to his injury.

In sum then, the following factors strongly support the conclusion which I have reached that Respondent failed to rebut the *Dean* presumption as to Tomas. First, Respondent maintained a general policy of transferring qualified employees to other projects when the availability of work warranted. Second, Respondent had work available beyond the two projects where Tomas actually worked. Third, Respondent transferred some employees from these two projects to its more lengthy Foto-Kem and Villa Gardens projects. Fourth, as found by Judge Parke and reaffirmed above, Respondent actually transferred Tomas from Cal-Med to AMC when the Cal-Med job ended. Fifth, the factors Respondent relied on for failing to transfer AMC employees in Tomas wage range on to other projects when that job ended (poor attendance and poor performance) do not apply to Tomas and cannot be imputed to him. *Cobb II*, supra. Sixth, the layoffs between November 1996 and January 1997 appear at odds with Losch's "dollar cost averaging" explanation regarding the factors favoring the retention of employees. And finally, at the time of his interview, Respondent actively considered assigning Tomas to the Foto-Kem project and it transferred other employees to that job following Tomas's discharge.

Likewise, Respondent's contention that Tomas should only be credited with eight weeks of gross backpay for 1996, 4th quarter, rather than ten as shown in the specification lacks merit. The number of Respondent's October pay days is not determinative of the backpay period. The

[10] The Work Status Report (Resp. Exhibit 6) contains no information concerning the date of Tomas's job transfer. It merely shows the date of treatment and the limited work restriction.

age-old backpay formulation established *F.W. Woolworth*, 90 NLRB 289 (1950), requires that backpay computations in situations such as this be made on a calendar quarterly basis.

However, I find that an adjustment in Tomas's 1996 4th quarter gross back pay would be in order for other reasons. That quarter commenced on September 29, and as I have found that Tomas's backpay period actually commenced on October 25, I further find that he should only be credited with 9.2 weeks of gross backpay during that quarter rather than the 10 weeks. Specification paragraph 3 employs language ("during each calendar quarter or portions thereof") that assumes fractional computations would be an "appropriate and reasonable method of determining the gross backpay liability." The fact that Respondent employed Tomas as an hourly rather than a salaried worker also warrants the use of a fractional work week approach. Accordingly, I find Tomas's gross backpay for the 1996 4th quarter would be $4784 ($520 per week times 9.2 weeks = $4784), and his net backpay for that quarter would be $1484.06 ($4784 gross backpay minus 3299.94 net interim earnings = $1484.06). [11]

Accordingly, I have recalculated the backpay due Tomas as follows and enter it as my conclusion of law concerning the amount of backpay due in this case.

Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net Interim Earnings	Net Backpay
1996	4th	4,784.00	3,299.94		3,299.94	1,484.06
1997	1st	6,760.00	4,389.74		4,389.74	2,370.26
1997	2nd	6,760.00	6341.86		6341.86	418.14
1997	3rd	5200.00	5,427.06		5,427.06	0.00
Total:						$4272.46
Total with $900 Medical Benefit:[12]						$5172.46

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[13]

Supplemental Order

Respondent, its officers, agents, successors and assigns, must pay Damir Tomas the sum of $5172.46 to plus interest accrued to the date of payment less withholdings for taxes required by State and Federal laws.

Dated: March 28, 2005, at San Francisco, CA.

_____
Administrative Law Judge

[11] A similar fractional adjustment at the end of the backpay period would be pointless. Even though Tomas appears to have worked only a partial week in during the first week of September 1997, his interim earnings for the quarter still exceeds his gross backpay even where, as the General Counsel assumed, he worked a full week prior to his September 1997 injury.

[12] I find that the specification correctly credits Tomas with three-fourths of the $1200 annual cash medical benefit.

[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.